

The record consists of the documents of record filed with the Director in this matter including the preliminary hearing before Administrative Law Judge on June 27, 1994, with the exhibits attached thereto as well as the preliminary hearing before the Honorable George R. Robertson on June 10, 1994 with the exhibits attached thereto.

ISSUES

(1) Did claimant suffer an injury arising out of and in the course of his employment with respondent for which compensation is due?

(2) Did claimant provide notice to the respondent of this alleged injury within ten days, and if not was there just cause for claimant's failure to provide said notice?

(3) Did the Administrative Law Judge exceed his jurisdiction in granting respondent additional time to present evidence at the second preliminary hearing of June 27, 1994?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for purposes of the preliminary hearing the Appeals Board finds as follows:

(1) Claimant has failed to meet his burden of proof that he suffered an injury arising out and in the course of his employment with the respondent on September 22 or September 23, 1993. Claimant, a Liquor Control Investigator III for the Kansas Department of Revenue alleges an injury to his neck and back while lifting a tool box full of exhibits from the trunk of his car either late the night of September 22 or early the morning of September 23, 1993. Claimant alleged he contacted the respondent and advised the office staff of his injury and requested time off from work due to the significant amount of pain he was in. Claimant's supervisor and the office staff contradict this allegation. His supervisor, Mr. James Karasek denied being advised by claimant that he had suffered an injury to his back at any time. The secretary, Kay, advised claimant called the office to report being sick but provided no information regarding any injury to claimant's back.

Claimant further alleged this injury resulted in severe headaches but the record indicated claimant had suffered these headaches on more than one occasion prior to the alleged date of injury. Claimant sought medical treatment with Dr. T. S. Webb and Dr. Alib Manguoglu. The claimant advised Dr. Webb that the left leg problems, which he alleges stems from this back injury, actually occurred as a result of a tumor that had been removed from his leg in March or April of 1993. Claimant failed to advise Dr. Webb of a work related injury. Claimant also failed to advise Dr. Manguoglu of the alleged work related nature of this claimed injury. Dr. Manguoglu's records indicate claimant had problems for at least a couple of years with no specific indication of an injury on September 22 or 23, 1993.

The testimony of Olivia Smith, an agent for Alcohol and Beverage Control, was taken at the June 27, 1994 continuation of the preliminary hearing. Ms. Smith recalled discussing claimant's illness with claimant but was unaware of any back problems. She was aware of the claimant's history of headaches and had contacted claimant while he was off work to inquire as to his medical well being. No mention of the back occurred during this conversation.

Mr. Karasek indicated that, while he had had conversations with claimant regarding his prior headaches, there had been no mention of a back injury.

Claimant admitted into evidence two documents to support his contention of a work related injury on September 22nd or 23rd, 1993. Claimant's "Exhibit I" is a note pad containing detailed telephone notes created by claimant during the time surrounding the alleged injury dates. This pad, containing handwritten notes regarding a multitude of personal and work related telephone conferences, contains no notes for the dates of September 22nd or 23rd regarding any work related injury claimant may have suffered or any telephone conversation claimant may have had with his supervisor. Claimant's "Exhibit II" is a calendar maintained by claimant during the time in question. This calendar contains multiple entries regarding claimant locations, driving times, and destinations, and appears to be used as some form of informal time sheet by the claimant. Claimant's "Exhibit II" does contain telephone notes on Tuesday, September 21st regarding claimant's alleged conversation with Mr. Karasek regarding another agent and the potential termination of that agent's employment. It also contains notes on September 27th indicating claimant had a telephone conversation with Mr. Karasek regarding his earlier alleged back injury. The Appeals Board finds it strange that, after reviewing this entire calendar which covers the year 1993, the only detailed telephone notes contained in this book are those dealing with the two telephone conversations allegedly with Mr. Karasek. The note sheets connected to claimant's "Exhibit I", which contain a multitude of notes dealing with various telephone conversations between claimant and other persons, contains no mention of either of these telephone conversations. It is difficult to contemplate that the claimant would change what appears to be a long term habit of note keeping for these two conversations only.

K.S.A. 44-501(a) states in part:

"In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation by proving the various conditions on which the claimant's right depends."

K.S.A. 508(g) defines burden of proof as follows:

"'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The burden of proof is upon the claimant to establish his right to an award for compensation by proving all of the various conditions on which his right to a recovery depends. The burden must be established by a preponderance of the credible evidence. Box v. Cessna Aircraft Company, 236 Kan. 237, 689 P.2d 871 (1984).

The contradictory evidence in this matter does not support claimant's contention that he suffered an injury arising out of and in the course of his employment on September 22nd or September 23rd, 1993. The evidence indicates claimant's medical problems pre-existed this injury date. This, coupled with his failure to advise the health care providers of this alleged work related incident, defeats claimant's claim for compensation. The Appeals Board finds claimant has not proven by a preponderance of the credible evidence that he suffered an injury on September 22nd or September 23rd, 1993 arising out of and in the course of his employment with the respondent, Kansas Department of Revenue.

(2) Claimant failed to timely notify the respondent that he suffered a work related injury on September 22nd or September 23rd, 1993 in violation of K.S.A. 44-520. K.S.A. 44-520 states in part:

"The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause...."

No evidence was presented to indicate there was just cause for claimant's failure to timely notify the respondent of his injury. The Appeals Board finds claimant failed to comply with the notice requirements of K.S.A. 44-520.

(3) The Administrative Law Judge did not exceed his jurisdiction in granting respondent the opportunity to present evidence at the continuation of the preliminary hearing on June 27, 1994.

K.S.A. 44-534a(a)(2) requires the employer be given the opportunity to present evidence including testimony on disputed issues regarding the compensability of a claim. The Administrative Law Judge's decision to continue the preliminary hearing until such time as the respondent had the opportunity to present its evidence coupled with the Administrative Law Judge's decision that this evidence should be in person thus giving the Administrative Law Judge the opportunity to more accurately judge the credibility of the witnesses is not error on the Administrative Law Judge's part. K.S.A. 44-534a(a)(2) requires the Administrative Law Judge render a decision within five days of the conclusion of such hearing. As the original hearing of June 10, 1994 was not concluded but rather continued until June 27, 1994 the conclusion of the hearing did not occur until June 27, 1994. The order of the Administrative Law Judge issued on June 29, 1994 was within five days of the conclusion of the hearing as is required by K.S.A. 44-534a.

AWARD

WHEREFORE, it is the finding, decision and order of the Appeals Board for preliminary hearing purposes that the order of Administrative Law Judge George R. Robertson on June 29, 1994, remains in full force and affect.

IT IS SO ORDERED.

Dated this _____ day of September, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc:

Kent Roth, Attorney at Law, 1314 Kansas Avenue, Great Bend, Kansas 67530
Richard Friedeman, Attorney at Law, PO Drawer 1110, Great Bend, Kansas 67530
George Gomez, Director
George R. Robertson, Administrative Law Judge